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19 **UNITED STATES DISTRICT COURT**
20
21 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

22 **Jenny Lisette Flores, et al.,**

23 *Plaintiffs,*

24 v.

25 **William Barr, Attorney General**
26 **of the United States, et al.,**

27 *Defendants.*

Case CV 85-4544 DMG-AGRx

**DEFENDANT'S OPPOSITION TO
PLAINTIFFS' AMENDED
MOTION FOR AWARD OF
ATTORNEYS' FEES**

INTRODUCTION

Defendants hereby oppose Plaintiffs' motion for fees and costs under the Equal Access to Justice Act ("EAJA"). This motion should be dismissed first and foremost because plaintiffs failed in their statutory duty to properly move under the EAJA within 30 days of final judgment, and are not entitled to equitable tolling in this matter. Moreover, Defendants were substantially justified in the June 2018 *Ex Parte* application for relief from the *Flores* Settlement Agreement. For both of these reasons the Court should deny Plaintiffs' motion. Finally, even if the Court finds that an award of EAJA fees is appropriate, the demand for significantly enhanced fees is unwarranted and the fees awarded should be reduced accordingly.

PROCEDURAL BACKGROUND

On June 20, 2018, the President issued an Executive Order requiring "[t]he Attorney General [to] promptly file a request with [this Court] to modify the [*Flores* Agreement], in a manner that would permit the Secretary [of Homeland Security], under present resource constraints, to detain alien families together throughout the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings." *See* Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13841, 83 Fed. Reg. 29435, 29435 (June 20, 2018) [hereinafter Exec. Order No. 13841]. On June 21, 2018, Defendants filed an *Ex Parte* Application seeking limited relief. The Court

1 denied such relief in an Order on July 9, 2018. [Dkt. #455] The government filed a
2 protective notice of appeal, and later dismissed the appeal on April 26, 2019,
3 rendering a final judgment on the matter. [Dkt. #539] Plaintiff filed a Motion for
4 attorneys' fees on May 28, 2019. [Dkt. #545] Because Plaintiffs failed to comply
5 with Local Rule 7-3, the Court denied Plaintiffs' motion on May 29, 2019. [Dkt.
6 #546] Plaintiffs' counsel then met and conferred with Defendants and, in
7 accordance with Local Rule 7-3, filed an Amended Motion seven days after that
8 meet and confer, on June 7, 2019. [Dkt. #550]
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13 **LEGAL STANDARD**

14 Under the "American Rule," each party ordinarily bears its own attorney's fees
15 unless there is express statutory authorization to the contrary. *See Alyeska Pipeline*
16 *Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245 (1975). One such statutory
17 authorization is the Equal Access to Justice Act ("EAJA"). "The EAJA renders the
18 United States liable for attorneys' fees for which it would not otherwise be liable,
19 and thus amounts to a partial waiver of sovereign immunity. Any such waiver must
20 be strictly construed in favor of the United States." *Ardestani v. I.N.S.*, 502 U.S.
21 129, 137 (1991) (citations omitted); *see also Ruckelshaus v. Sierra Club*, 463 U.S.
22 680, 685–86 (1983) ("Waivers of immunity must be construed strictly in favor of
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1 the sovereign,” and not “enlarge[d] . . . beyond what the language requires.”)
2 (citations omitted).

3 The EAJA provides,
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5 [A] court shall award to a prevailing party other than the United States
6 fees and other expenses, in addition to any costs awarded pursuant to
7 subsection (a), incurred by that party in any civil action (other than
8 cases sounding in tort), including proceedings for judicial review of
9 agency action, brought by or against the United States in any court
10 having jurisdiction of that action, unless the court finds that the position
of the United States was substantially justified or that special
circumstances make an award unjust.

11 28 U.S.C. § 2412(d)(1)(A). Accordingly, a litigant is entitled to attorneys’ fees and
12 costs only if: (1) he or she is the prevailing party; (2) the government fails to show
13 that its position was substantially justified or that special circumstances make an
14 award unjust; and (3) the requested fees and costs are reasonable. *Id.* Notably, in
15 order to obtain fees pursuant to this provision, an EAJA applicant must,
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17 within thirty days of final judgment in the action, submit to the court an
18 application for fees and other expenses which shows that the party is a
19 prevailing party and is eligible to receive an award under this
20 subsection, and the amount sought, including an itemized statement
21 from any attorney or expert witness representing or appearing in behalf
22 of the party stating the actual time expended and the rate at which fees
23 and other expenses were computed. The party shall also allege that the
24 position of the United States was not substantially justified. Whether or
25 not the position of the United States was substantially justified shall be
26 determined on the basis of the record (including the record with respect
27 to the action or failure to act by the agency upon which the civil action
is based) which is made in the civil action for which fees and other
expenses are sought.
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1 *Id.* § 2412(d)(1)(B). Further, the EAJA provides that attorneys’ fees shall not be
2 awarded in excess of \$125.00/hour unless the court determines that “an increase in
3 the cost of living or a special factor, such as the limited availability of qualified
4 attorneys for the proceedings involved justifies a higher fee.” *Id.* §
5 2412(d)(2)(A)(ii).
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8 A prevailing party may recover attorneys’ fees only if the position of the
9 United States was not “substantially justified.” 28 U.S.C. § 2412 (d)(1). Although
10 the prevailing party is required to clearly allege that the position of the United
11 States was not substantially justified, the government bears the burden of
12 establishing substantial justification. *E.g., Guiterrez v. Barnhart*, 274 F.3d 1255,
13 1258 (9th Cir. 2001). The government may meet that burden by establishing that
14 its position was “justified to a degree that could satisfy a reasonable person.”
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16 *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). In determining whether the
17 government’s position was reasonable, a reviewing court must ascertain “first,
18 whether the government was substantially justified in taking its original action; and
19 second whether the government was substantially justified in defending the
20 validity of the action in court.” *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988).
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25 A position can be justified even though a court ultimately finds that it is not
26 correct. *Pierce*, 487 U.S. at 566. The government may sustain its burden by
27 showing that its position is a novel but credible extension or interpretation of the
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1 law. *Petition of Hill*, 775 F.2d 1037, 1042 (9th Cir. 1985). That the government
2 lost does not raise a presumption that its position was not substantially justified,
3 and the government need not show that it had a substantial likelihood of prevailing.
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5 *Id.*

6 7 **ARGUMENT**

8 **I. The Motion Should be Denied Because Plaintiffs Did Not File Their** 9 **EAJA Motion Within The Statutory Timeframe.**

10 Plaintiffs filed their EAJA motion well after the statutory deadline, and the
11 Court therefore should deny their EAJA Motion. Plaintiffs should not be entitled to
12 equitable tolling because their late filing was due to neglect, and in any event, they
13 did not request equitable tolling from the Court.
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15 In order to be considered for fees and costs under EAJA, a motion must be filed
16 with the Court no later than 30 days from final judgment. When the government
17 dismisses its own appeal, as it did in this matter, the court's judgment dismissing
18 the case triggers the thirty-day filing period. *See Pierce v. Barnhart*, 440 F.3d 657,
19 662 (5th Cir. 2006) ("We hold that where, as here, the government dismisses its
20 own appeal, the date of dismissal commences the thirty-day period."). In addition,
21 a court may not, by local rule, shorten or extend the time for filing an EAJA
22 petition. *See Al-Harbi v. INS*, 284 F.3d 1080, 1082 (9th Cir. 2002) ("[T]o the
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1 extent that [the time limit in] Ninth Circuit Rule 39-1.6 is inconsistent with the
2 EAJA, the Circuit Rule is inapplicable, and the EAJA controls.”).

3 The EAJA is a waiver of sovereign immunity and must be construed
4 narrowly. *See Auke Bay Concerned Citizen’s Advisory Council v. Marsh*, 779 F.2d
5 1391, 1392-93 (9th Cir. 1986). In the present matter, Plaintiffs’ Amended Motion
6 was filed well past the 30-day deadline. The judgment became final on voluntarily
7 dismissal by the government on April 26, 2019. [Dkt. #539] Plaintiffs filed an
8 initial Motion for Attorney Fees on May 28, 2019, which satisfied the deadline.
9 [Dkt. #545] However, the Court promptly denied and dismissed this motion given
10 the failure of Plaintiffs to comply with Local Rule 7-3. [Dkt. #546] Plaintiffs
11 proceeded to re-file their Motion, now including an amended statement indicating
12 compliance with Local Rule 7-3, on June 7, 2019. [Dkt. #550] This filing,
13 however, was made 42 days after the final judgment date and no longer complies
14 in a timely manner with EAJA. Accordingly, the motion should be denied as
15 untimely.

16 While equitable tolling might apply in certain circumstances to excuse a
17 party from filing outside the 30-day deadline, the Court’s discretion to apply
18 equitable tolling is limited to a case by case basis, and should be used sparingly.
19 The Supreme Court has declined to apply such relief in instances of mere
20 carelessness on the part of plaintiff. *See Irwin v. Dep’t of VA*, 498 U.S. 89, 96
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1 (1990) (declining to offer equitable tolling given an excuse ranked “at best [as] a
2 garden variety claim of excusable neglect”). In addition, courts have opted against
3 considering applying the doctrine when the reasons equitable tolling is merited are
4 unknown. *See Bernstein v. DOC*, No. C 95-0582 MHP, 2004 U.S. Dist. LEXIS
5 6672 (N.D. Cal. Apr. 19, 2004) (refusing to consider an equitable tolling when
6 “applicants have not put forth a sufficient equitable basis for invoking the
7 doctrine”). Here, Plaintiffs are not entitled to equitable tolling of the EAJA
8 statutory deadline because they provide no explanation at all for their failure to
9 timely file their motion, let alone one that could be seen as anything other than
10 carelessness or neglect.
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15 The Amended Notice of Motion makes only one direct reference to the
16 refiling as timely. *See* Plaintiffs’ Amended Notice of Motion for Attorneys’ Fees at
17 1 [Dkt. #550] (“This Amended Notice of Motion and Motion is timely, in
18 accordance with the Court’s Minute Order allowing refiling without prejudice after
19 compliance”). Plaintiffs note that refiling is permitted pursuant to the Court’s
20 Order, which expressly allowed for refiling. However, Plaintiffs fail to discuss the
21 timeliness issue or to explain how their amended filing might be found to meet the
22 statutory deadline when it was filed 12 days after that deadline. They fail to explain
23 why they should be excused from failing to timely file because they failed to
24 comply with the local rule requiring a meet and confer with counsel. And they
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1 provide no reason why that failure was anything other than careless, particularly
2 given that they have complied with that very local rule in numerous other filings in
3 this litigation. In short, Plaintiffs provide no information or explanation that would
4 warrant equitable tolling in this specific matter. Given the long established practice
5 of construing waivers of sovereign immunity narrowly, the Court should therefore
6 deny Plaintiffs' motion as untimely filed.
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9 **II. Defendants Have Substantial Justification Due to Special**
10 **Circumstances**

11 If the Court considers the motion on the merits, then the Court should deny
12 the motion because Defendants were substantially justified in their position in the
13 underlying litigation. Specifically, Defendants were substantially justified in
14 bringing their motion because they were required to do so by the Executive Order,
15 and recent injunctions had raised special circumstances of particularly novel and
16 complex issues in this matter.
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20 The EAJA permits a court to deny attorneys' fees and expenses to prevailing
21 parties where "the court finds...that special circumstances make an award unjust."
22 28 U.S.C. § 2412(d)(1)(A). The legislative history further explains that "[t]his
23 'safety valve' helps to insure that the Government is not deterred from advancing in
24 good faith the novel but credible extensions and interpretations of the law that often
25 underlie vigorous enforcement efforts." H.R. Rep. No. 96-1418, at 11 (1980),
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1 *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990; S. Rep. No. 96-253, at 7 (1979). As
2 pertains to this case, the preliminary injunction issued in the ongoing *Ms. L* case
3 presented novel and complex challenges to the government with regard to the issue
4 of keeping families together in family residential centers. Additionally, Executive
5 Order No. 13841 raised new questions about the government’s custody of families,
6 and required Defendants’ request to the Court for emergency modification of the
7 *Flores* Settlement. *Ms. L. v. United States Immigration & Customs Enf’t (“ICE”)*,
8 310 F. Supp. 3d 1133 (S.D. Cal. 2018). Because the underlying filing was a result of
9 the challenging legal scenario resulting in the *Ms. L.* injunction as well as an
10 Executive Order requiring the filing, there is good reason to find that the
11 government’s position was substantially justified and to deny Plaintiffs’ motion on
12 that ground.
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18 **III. Plaintiffs Demand an Unreasonably Enhanced Fee**

19 Should the Court find that an award is justified, the Court should reduce the
20 amount awarded because Plaintiffs are requesting an unreasonably enhanced fee
21 structure.
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23 A district court may not award attorneys’ fees in excess of \$125 per hour,
24 “unless the court determines that an increase in the cost of living or a special
25 factor, such as the limited availability of qualified attorneys for the proceedings
26 involved, justifies a higher fee.” 28 U.S.C. § 2412(d)(2)(A)(ii). This \$125 per hour
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1 rate may be presumptively construed as a ceiling, not a floor. *See Mathews-Sheets*
2 *v. Astrue*, 653 F.3d 560, 563 (7th Cir. 2011) (“The \$125 rate is a presumptive
3 ceiling; to justify a higher rate the plaintiff must point to inflation or some other
4 special factor.”) The Ninth Circuit has notably held that any practice specialty in a
5 particular area of the law may constitute a “special factor” for EAJA purposes. *See*
6 *Nadarajah v. Holder*, 569 F.3d 906, 912-14 (9th Cir. 2009). However, if such
7 practice specialties routinely are recognized as “special factors,” then fee awards
8 that are actually subject to the statutory cap imposed by Congress will indeed be
9 rare. *See Thangaraja v. Gonzales*, 428 F.3d 870, 876 (9th Cir. 2005) (“We decline
10 to adopt counsel’s proposed per se rule that ‘the practice of immigration law
11 should be classified as a specialty similar to practicing patent law.’”).

12 Accordingly, even if a case arises in the context of a particular field of law, if there
13 were no complex factual or legal issues unique to that field of law, then there can
14 be no basis for an enhancement on the basis of “limited availability of qualified
15 counsel.” *See United States v. Real Prop. Known as 22249 Dolorosa St.*, 190 F.3d
16 977, 984 (9th Cir. 1999) (“[e]ven assuming that expertise in defending civil
17 forfeiture actions qualifies as a practice specialty requiring distinctive knowledge
18 and skills, [the additional requirements that the skills be needed in the litigation
19 and unavailable elsewhere at the statutory rate] have not been met here.”); *Rueda-*
20 *Menicucci*, 132 F.3d 493, 496 (9th Cir. 1997) (“[w]hile we believe that a specialty
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1 in immigration law could be a special factor warranting an enhancement of the
2 statutory rate...we find that counsel's specialized skill was not needful for the
3 litigation in question").
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5 The enhanced fee requested by Plaintiffs in this matter is excessive and
6 should not be ordered by the Court. Specifically, Defendants oppose an award of
7 \$950/hour for Peter Schey. *See* Plaintiffs' Amended Notice of Motion for
8 Attorneys' Fees at 14 [Dkt. #550]. While Defendants recognize that the Court has
9 previously found that "Schey...[is] uniquely positioned to efficiently litigate the
10 enforcement action in question," in this action any particular expertise of Mr.
11 Schey was not required, and the increasing enhancement of Schey's rate with each
12 passing litigation is inappropriate. [Dkt. #383] Notably, the Special Monitor in this
13 case is paid at a rate of only \$275/hour, *see* Order Appointing An Independent
14 Monitor at 17 [Dkt. #494], and a payment to Plaintiffs' counsel of more than three
15 times that rate for a motion that did not raise any issues "requiring distinctive
16 knowledge and skills" is plainly excessive. Defendants therefore assert that if the
17 Court awards fees to Plaintiffs, it should award a rate to Mr. Schey that is more in
18 line with the Monitor's rate of \$275 per hour.
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25 **CONCLUSION**

26 Plaintiffs have failed in their statutory duty to comply with the deadline and
27 have forfeited their request of attorney fees. Moreover, Plaintiffs are not entitled to
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1 EAJA fees as the Government was substantially justified in their litigation. Finally,
2 the enhanced fee of attorney Peter Schey has exceeded a reasonable level and
3 should be reduced.
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5 DATED: July 12, 2019

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants.

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